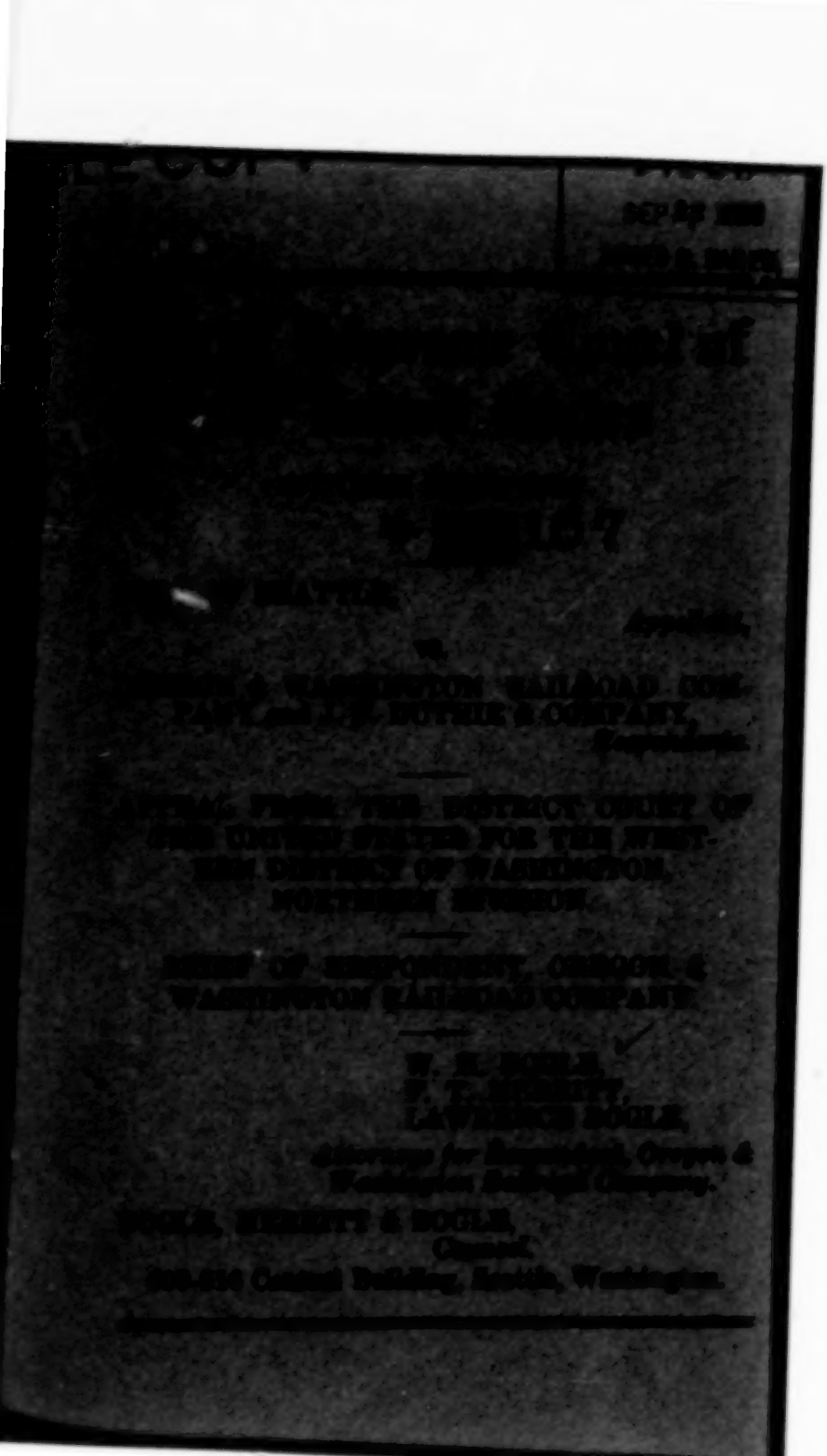

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 377.

PORT OF SEATTLE,

Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY,

Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF RESPONDENT, OREGON & WASHINGTON RAILROAD COMPANY.

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PORT OF SEATTLE,

Appellant,

VS.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY,

Respondents.

I.

ARGUMENT ON REMOVAL.

The case was properly removed from the State Court to the Federal Court. The Port of Seattle is a municipal corporation, created by the state, and, under the previous decisions of this court, is a citizen of the state, within the Removal Act, to the same extent as counties, cities, or other municipal corporations.

> *Chilcot Co. v. Sherwood*, 148 U. S., 529;
> *Cowles v. Mercer County*, 7 Wallace, 121;
> *Lincoln County v. Luning*, 133 U. S., 530;
> *Camden Interstate Ry. Co. v. City, et al.*, 129 Fed., 421.

This is apparently conceded by appellant, but the contention is made that the Port of Seattle in this action is suing solely on behalf of the State of Washington, and is merely a nominal party, the state being the real party in interest.

1. The state is not a party to the record; and,

as the requisite diversity of citizenship between the parties of record existed, a proper record case for removal was shown. Whether the record plaintiff was merely a nominal party, and the state the real and only party in interest and against whom alone the judgment would operate, could not be determined without a consideration of the nature of the case, and involves a question on the merits rather than one of jurisdiction.

> *Ill. Central R. Co. v. Adams*, 180 U. S., 410; *Scully v. Bird*, 209 U. S., 481.

The 11th Amendment, in terms, applies only to suits brought against a state. This court, however, in *M. K. & T. R. Co. v. Hickman*, 183 U. S., 53, held that the principle of the amendment would be applied in removal cases where the state was in fact the real, though not the nominal, party plaintiff, and "it may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate."

In the case at bar, the defendants were in possession of the waterway area in question, having certain structures extending from the abutting property of the Railway Company to the navigable water of the waterway, and exercising the right of

access from such abutting lots to the navigable water across this intervening area. The plaintiff sought to enjoin the Railway Company from enjoying or exercising this right of access, asserting that it—the plaintiff—had been authorized by the state to use, or lease the right to use, this waterway area. Whether the state had or could grant this right to plaintiff, with respect to this particular area in front of defendants' lots, presented a question for judicial ascertainment and decision, and defendant Railway Company, being a nonresident, had a right to remove the case in order to have this question determined by the Federal Courts.

Where the state is not a party of record, it is immaterial, in applying the principle of the amendment, whether the party claiming or asserting authority from the state is the plaintiff or defendant in the action. Whether the state is the real and only party in interest depends upon a consideration of the real objects of the suit and the effect of the judgment therein, and not upon the position of the parties as plaintiff or defendant.

The respondent Railway Company could have maintained an action against the Port of Seattle to enjoin it from interfering with the Railway Com-

pany's possession of this area and its enjoyment of the right of access over it; and the fact that the Port claimed to be so interfering or threatening to interfere by authority of the state, or asserted the state's ownership and the Port's right to control and regulate the use of the area under the authority and power conferred upon it by the state, would not have debarred the Railway Company from maintaining such action in the Federal Courts, the requisite diversity of citizenship being shown.

In *Scranton v. Wheeler*, 179 U. S., 141, suit was brought by Scranton to enjoin Wheeler from obstructing or interfering with riparian rights claimed by Scranton. Wheeler had acted solely as an officer or agent of the United States and claimed to be acting wholly under authority of the Government. This court held that the United States was not a party, and the action could be maintained. The court said (p. 152):

> "If the plaintiff was entitled to access from his land to navigable water and if the defendant stood in the way of his enjoying that right, then the court was under a duty to inquire whether the defendant had or could have any authority in law to do what he had done; and the suit was not to be deemed one against the United States because in the consideration of that question it would become necessary to ascertain whether the defendant could constitu-

> tionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and, the United States not being a party of record, a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff."

In that case, Scranton was in the possession and enjoyment of the right of access, and in the case at bar the Railway Company was similarly in the possession and enjoyment of the right of access. Wheeler claimed the right to obstruct the right of access under and by authority of the United States, while the Port claims a similar right under and by authority of the state. Whether the Port had or could have a right to deprive the respondent of the right of access to navigable water in front of its land, was a question to be decided by the courts between these parties to the record.

In *Tindall v. Wesley*, 167 U. S., 204, a suit to recover possession of real estate, the defendants having possession and claiming the right to such possession solely as officers of the state and under its authority, was held to be within Federal jurisdiction, as the state was not a party nor bound

by the judgment in the case. See also *U. S. v. Lee*, 106 U. S., 196.

In *Pennoyer v. McConnaughy*, 140 U. S., 1, a suit to enjoin state officers from selling and conveying land by authority from the state, the plaintiff asserting title to the land, was held not to be a suit against the state. The same principle was applied by Mr. Justice Harlan in *Howell v. Miller*, 91 Fed., 129.

In order to entitle it to a decree in this case, it was necessary for the plaintiff to prove that respondent was not the owner of the right of access across this area; that the ownership was either vested in this plaintiff, or was vested in the state and that the state had authorized this plaintiff to maintain suits to prevent defendant from using the area for access to the navigable water. These are questions going to the merits, upon which the respondent is entitled to a trial in the Federal Court. The state has not intervened in the case; there is no authority in law for binding the state by any judgment against this plaintiff; and, as held in *Tindall v. Wesley, supra*, "the state not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to

the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute."

Conceding that the principle of the 11th Amendment will be applied to the removal act where the representative of the state is the plaintiff, these cases seem to determine conclusively that the state is not the real party in interest in a controversy between a citizen in possession of property or property rights and other individuals seeking to interfere with such possession or the enjoyment of the right and asserting authority from the state to do so. The essential issues are the same and the real parties are the same, whether the suit is brought by the one party or the other. If the Port can be considered as an officer or agent of the state, it cannot interfere with respondent's possession of property nor exclude Federal jurisdiction by merely asserting that respondent has no title. Whether it has right to possession is a judicial question, involved in the merits of the case. The judgment imposes no liability upon the state, requires no affirmative action by its officers, deprives it of no property it now possesses, and takes from it no revenue it ever enjoyed. The decree, insofar as it is favorable to respondent, decides that the Act of 1911 is un-

constitutional and void, as to the area occupied by respondent under prior grants from the state; and therefore the plaintiff had no justification for interfering with respondent's possession.

2. The Port of Seattle was created by the state, and given a corporate entity, with power to acquire and own property, enter into contracts, incur indebtedness, levy taxes, manage and control waterway areas belonging to the state and enjoy the greater part of the revenue therefrom for its own corporate purposes. It has the power to sue and be sued in its own corporate name, and exercised that power in this case. It would seem that the state thereby consented to sue and be sued in the name of this municipality, insofar as it entrusted the management of its property and consented to be represented by the municipality.

> *Interstate Co. Co. v. Regents*, 199 Fed., 509;
> *Hopkins v. Clemson Ag. Col.*, 221 U. S., 636.

If the state has consented to sue and be sued in the name of this municipality, a non-resident sued by it is entitled to remove the case to the Federal Courts.

> *Reagan v. Farmers L. & T. Co.*, 154 U. S., 362, 391.

3. An examination of the record, and of the

state statutes creating the plaintiff as a municipal corporation, shows clearly that the plaintiff is, in reality, asserting its own claim of ownership of the right to use, exclusively, this waterway area for its own corporate purposes and for the revenue it may derive therefrom. The state has, at most, only a remote, indirect and contingent interest in the results of the suit.

The complaint, in paragraph IV, alleges as the basis for the relief it seeks that the waterway area in question "is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington;" that respondent Railway Company has not obtained from nor applied to appellant for a permit to use this area, but, without any such permit, it had leased its certain lots abutting on this waterway to Duthie & Co., and by the terms of this lease respondent "purports to claim and does claim jurisdiction over said waterway area;" that respondent in fact "has no right, title or interest in said waterway area," and that any such claim upon its part is unfounded. The lease referred to is made an exhibit to the bill of complaint. The only right, title or interest, or, as the complaint phrases it, the "jurisdiction," which respondent claimed in the lease in or over the waterway area, was the right

of access, including the right to "wharf-out" to the pier-head line in the waterway, subject to proper supervision by Federal and State authorities. The suit was broght to enjoin respondent from exercising the right so claimed by it.

The Port District was created under the Act of 1911, Session Laws, p. 419, as amended by Chapter 62, Session Laws of 1913. By these Acts the Port was given power to acquire, by purchase or condemnation, lands and other property; to construct, condemn, purchase, conduct and operate, wharves, docks, ferries, canals and other harbor improvements, and rail and water transfer and terminal facilities; "to improve navigable and non-navigable waters of the United States, and of the State of Washington within the Port District * * * *to regulate and control all such waters and all* natural or artificial waterways (waterways of commercial waterway districts excepted) within the limits of such Port District, *so far and to the full extent that this state can grant the same*, and remove obstructions therefrom," and to fix its rates for wharfage, dockage, etc. The county treasurer is made the treasurer of the Port District, etc. In addition to the powers specified, the Port District has further power to levy taxes, issue bonds, and in general exercise

similar powers to those exercised by counties, including the power to sue and be sued.

See—

Paine v. Port of Seattle, 70 Wash. 294;
Hill v. Bridges, 87 Wash. 260.

The boundaries of the appellant Port District are coterminous with the boundaries of the county in which it is located.

The Act of March 22, 1913 (Chapter 168 Session Laws, 1913), quoted by appellant in its brief, commencing on page 10, provides that no structures shall be allowed in any of the artificial waterways created by the state between the boundary and the pier-head lines, except under permit or lease from the State Land Commissioner, with respect to waterways located outside of Port Districts, or permits or leases from the Port District as to such waterways located within such district, and prescribing the rate of rental to be charged for such leases. The rental prescribed for this area within Port Districts inures seventy-five per cent. to the Port District and twenty-five per cent. to the state. In event the Port District constructs its own improvements thereon, as it is authorized to do, the Port retains the entire income therefrom, the state receiving no part of it.

The complaint, as it stood at the time the case was removed, sought a decree of the court (a) enjoining the defendant Railroad Company from "claiming or asserting any jurisdiction over the waterway area" described in the complaint; (b) that the lease from the Railroad Company to Duthie & Company be reformed "by striking therefrom all passages therein in which the said * * * Railroad Company claims jurisdiction over said waterway area and attempts to grant to said J. F. Duthie & Company any right, title or interest therein;" (c) that the Railroad Company be required to return any such rents collected for this waterway area and be enjoined from making any further collections of such rentals; (d) that the title of complainant, for and on behalf of the state, in and to the waterway area, be quieted as against both defendants; and (e) that it be decreed that the Railroad Company as owner of abutting lots, "has no right, title or interest in said waterway area, or any part thereof, or any jurisdiction thereof."

It will thus be seen that the bill asserts the right of the Port District to exercise control over this water area, and to prevent the defendants from disputing its right of control, or from themselves using it, without a permit or lease from the Port District.

After the case was removed, paragraph VI of the complaint was stricken by the court on motion of respondent, thereby eliminating from the case all questions relating to the dealings between the respondent and J. F. Duthie & Company.

The gist of the complaint was the asserted right of the Port District to prevent respondent from using this waterway area except under a permit or lease from the Port, and to secure a decree establishing the Port's right to use this area for purposes of revenue. The power or right to control the use of this waterway area, if it did not belong to the respondent, was vested in the Port District by the grant contained in the Acts creating the Port and pertained to it as a municipal corporation by virtue of that grant. This grant, as set out in the Act creating Port Districts, was "to regulate and control all such waters and all natural or artificial waterways * * * within the limits of such Port District, so far and to the full extent that this state can grant the same and remove obstructions therefrom."

The later Act of the same session of the Legislature—Chapter 168 of the Laws of 1913—did not change the powers of the Port, but merely asserted that the area between the boundary and pier-head lines in artificial waterways located within the Port

Districts should remain free from obstructions, except under permits or leases granted by the Port District, and prescribing the terms upon which such permits might be granted, or by use by the Port District itself.

The fact that the state has reserved to itself one-fourth of any rentals which may be received by the Port District from their waterway leases, does not make the state the "real party in interest" in a suit brought by the Port District to establish or determine its right to control the area and prevent use thereof by respondent without a lease from the Port.

> *M. K. & T. Railway Co. v. Hickman*, 183 U. S., 53.

The suit was not brought to collect rents, in which the state would have a one-fourth interest; but to establish the Port's right to control the use of this waterway area in front of respondent's lots. The so-called Port Acts (Acts of 1911 and 1913) granted this right of control to the Port "so far as and to the full extent that this state can grant the same." (Page 24, App. Brief.)

The power of regulation and control given to Port Districts under the Acts of 1911 and 1913 are similar in character, although not in extent, to those

given the City of Wilwaukee by the State of Wisconsin and which the city asserted in the case of *Yates v. Milwaukee*, 10 Wall., 497. The Federal Court, in the first instance, and this court on appeal, entertained jurisdiction of a suit to restrain the city from interfering with the complainant's wharf under this delegation of "public authority on the subject of wharves," etc. There seems to have been no suggestion even that the state was the real party in interest, and that the court was without jurisdiction under the 11th Amendment. The instant case does not differ in principle from an action by a county to cut off an abutting property owner from a public highway except on condition of paying a rental therefor.

The respondent claims the right of access to its lots from the navigable waters of this waterway over this strip between the shore and pier-head line, and the right to "wharf-out" to the pier-head line, under the grants from the state to its predecessors in title made prior to the passage of the Acts of 1911 and 1913, and contends that the rights of regulation and control granted to the Port by the state by these later Acts are subordinate to respondent's rights of access acquired through prior grants from the state. In dealing with these areas and in

making leases thereof, the Port acted in its own name. See "Ex. B" to complaint, Vol. 1, Tr. of R., p. 9. If the rights claimed by the Port should be sustained, the utmost interest of the state therein would be a contingent interest of one-fourth in any rentals the Port might subsequently collect from any leases it might hereafter make of this area; the Port, however, having the right to make its own improvements thereon, in which event it retains all of the rentals or earnings.

Appellant states its theory of the interest of the state, on page 43 of its brief, as follows:

> "It will not be denied that the title to the waterway areas is vested in the state. This suit is brought for the purpose of quieting the state's title, basing the right of the Port upon the powers conferred upon the Port as the representative of the state both in the Port Act from which we have quoted in the statement of the case and in Chapter 168 of the Laws of Washington of 1913 which has been set forth in full."

It is true that one relief asked in the complaint is "that the *title* of the plaintiff, for and on behalf of the State of Washington, in and to said waterway area, be quieted as against" the respondent. But the title to this waterway area is not involved, and is not disputed by respondent. Section 5 of the Act of 1890 (Appellant's Brief, p. 14), under which

the waterway was created, provides that "all public ways that may be established under the provisions of this Act are, and shall forever be, reserved from sale or lease, as public ways for water craft." The State Supreme Court has held that under these acts the areas within the boundaries of the waterways are dedicated to public use, and held by the state in trust for such public use, and not in a proprietory capacity. *State v. Sup. Ct.*, 91 Wash., 454. The *title* is and has always been in the state in trust for public use. The right of access to and from the abutting property to and from the navigable waters of this "public way" beyond the pier-head line, and the right to construct wharves and other aids to commerce and navigation in order to conveniently enjoy the right of access, are the rights which respondent claimed and which the bill of complaint sought to enjoin respondent from exercising. The gravamen of the bill was the asserted right to prevent this modified or restricted use of this strip for purposes of access to the abutting property. There is no averment of fact in the bill of complaint which brings the *title* into dispute. The lease from respondent to Duthie & Company, made a part of the bill of complaint as "Exhibit A," does not disclose any claim of title to the waterway, but only a claim of right to use this waterway area for pur-

poses of access from its lots to the navigable waters; and the real scope and purpose of the bill of complaint is to determine whether respondent had such right of access over this strip. There is no Act of the Legislature of the state purporting to vest in Port Districts authority to bring suits to determine or quiet the title of the state to this or any other class of property. An adjudication on the title of the state to any property, in a suit brought by a Port District, would not conclude the state. *Tindall v. Wesley*, 167 U. S., 204, 223. If the right of access did not pass as an appurtenance to the state's grants of these abutting lots, the right to control the use of this waterway area was granted by the state to the Port District by the statutes of 1911 and 1913, coupled with an interest in the revenue it might derive therefrom, and in asserting such right, the Port is asserting its own corporate rights and powers for its own benefit. On the other hand, if the right of access did pass as an appurtenance to abutting lots by the state's grants in 1904, there is nothing in the statutes of 1911 and 1913 authorizing Port Districts, on behalf of the state, to repudiate these prior grants or to maintain any suits in the name or on behalf of the state to challenge or seek a judicial determination of the legal effect of the prior grants. The

Port can seek such determination in its own name and upon its own asserted interest, but not as the authorized representatives of the state. Before it can claim the immunity pertaining to the state, it must not only purport to assert the state's right, but must show that it is authorized by the state to take such action on behalf of the state. In this case, the interest or right asserted by the Port is its own interest or right, not that of the state; and it has not shown any lawful authority for suing on behalf of the state, or any authority for concluding the state by the adjudication it seeks.

That the only issue presented by the bill of complaint related to the rights of the Port District to control and regulate the use of this waterway strip, under the purported grants of that right in the Acts of the Legislature previously cited, is further shown by the final decree in the lower court, which dealt only with the right of access to the abutting lots across the strip.

A plaintiff can in no event claim the immunity belonging to the state unless the relief sought inures to the state alone. He cannot join or tender issues the relief upon which would inure partly to himself and partly to the state. The relief sought in the present suit would not inure "alone" to the

state. In at least one of the issues presented by the complaint—that relating to the repayment of the rent received by respondent from Duthie & Co.—the state could not have any possible interest. If the possible future collection of rentals for the use of the waterway area can be considered as within the relief sought by the bill, such rentals would not inure to the state "alone;" on the contrary, seventy-five per cent thereof would inure to the Port itself; and if the Port used the waterway area in its own projects, the entire benefit would inure to it. The "real parties in interest" therefore are the Port District, claiming the right to control the use of this water area or strip under the legislative grant to it, and, as a part of such right of control, to enjoin respondent from any use of the area without a lease from and payment of rentals to the Port District, on the one side, and respondent Railway Company in possession and claiming a right to use this area for access to its abutting lots, under prior grants from the state, on the other side. The state, at most, has only an indirect and contingent interest in the result, depending upon the use the Port might make of the area, if control was awarded to it. If the Port constructed its own wharf on the area, the state would receive nothing from it; if the Port leased the wharfage privilege to a third

person, the state would receive one-fourth of the rent.

II.

ARGUMENT ON THE MERITS.

By Sec. 1, Art. XVII of the Constitution of the State of Washington, the state asserted "its ownership to the beds and shores of navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

Sec. 1, Art. XV of the State Constitution is as follows:

> "The Legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof on either side. The state shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide and within not less than 50 nor more than 600 feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its right to control the same relinquished,

> but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

Sec. 2 of the same article requires that

> "The Legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the Legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures."

Pursuant to Art. XV the Legislature at its first session passed the Harbor Line Commission Act quoted on pages 18 and 19 of appellant's brief. This Act created a Board of Harbor Line Commissioners and imposed upon them the duty of locating and establishing harbor lines in all harbors, estuaries, bays and inlets of the state within or in front of the corporate limits of any city or within one mile thereof, and provided that they should file a plat thereof in the office of the Secretary of State, and a duplicate plat in the office of the clerk of the city or town where the harbor lines were located. At the same session of the Legislature the Tide Land Act was passed, quoted in appellant's brief beginning on page 20. This Act provided for the survey, platting and appraisal of the state tide lands by a

board called the Board of Appraisers, with a view to the sale thereof by the state. The Act provided that the board should prepare plats showing all shore and tide lands surveyed and appraised, and extend the lines of the United States survey over the same, and that one copy of the plat should be filed with the County Auditor in each county affected, and one copy delivered to the State Board of Equalization.

At the same session and on March 28th, the Legislature passed the Waterway Act quoted in appellant's brief beginning on page 14. This Act provided for the establishment of one or more "public ways across all of the tide flats that are situated within or in front of any incorporated city or town within the State of Washington." Also, that such public ways should be not less than 50 nor more than 1,000 feet wide, and should commence at the outer or deep water end in not less than 20 feet of water at low tide, and extend inland across the state's tide lands; that such public ways when established should be well defined and marked by a post, and that

> "All such waterways shall be correctly surveyed and connected by metes and bounds with the government surveys or such other permanent land marks as will make a lasting record; and a correct plat of all public ways so estab-

lished shall be made, one copy of which shall be filed with the Secretary of State, one copy with the Commissioner of Public Lands of the state, one copy shall be kept in the office of the chairman of the Board of Harbor Line Commissioners, and each county shall be furnished with a correct plat of all such public ways established or within its borders, and such plats shall be filed as city or town plats are filed, and become a part of the county records."

The Act defined tide flats or tide lands as used in the Act as meaning "all lands over which the tide ebbs and flows and which is bare at low tide."

By Section 7 of the Act, the duty of establishing and laying out these public ways was devolved upon the Board of Harbor Line Commissioners.

In 1893 the Legislature passed an Act (quoted in appellant's brief beginning on page 16) providing for the excavation of these public ways, and giving a lien upon tide lands adjoining to pay the costs and expenses of such excavation.

Pursuant to these constitutional and statutory provisions, the Board of Harbor Line Commissioners in 1894 and 1895 established the harbor lines on the waterfront on Elliott Bay, and also established and laid out certain waterways across the tide lands lying south of Elliott Bay. There were two main waterways created, one lying to the west-

ward and called "West Waterway," and which connected directly with the main stream of Duwamish River; the other is called "East Waterway," and is the one involved in this suit. It commences near the southeast corner of Elliott Bay and extends south to a point near Spokane Street. This part of the waterway as laid out was 1,000 feet wide. From a point near Spokane Street a smaller waterway, being an extension of East Waterway, but only 400 feet in width, was created, extending southwesterly to a connection with Duwamish River or the West Waterway. A third way called "Canal Waterway," extended from a connection with East Waterway near Spokane Street easterly across the tide lands to the uplands on the east. Canal Waterway was 300 feet in width. Within the limits of East Waterway extending from Elliott Bay to the point near Spokane Street, the Commissioners established lines on each side of the waterway and 250 feet distant from each shore, which were marked and designated on the plat "Pier Head Line," leaving a fairway 500 feet in width. No similar line was established or shown in either of the two smaller waterways named above.

On November 17, 1894, the United States War Department also approved these harbor lines on

Elliott Bay and pier-head lines in East and West Waterways as established by the Harbor Line Commission.

Plaintiff's "Exhibit 1" herein shows the main East Waterway 1,000 feet in width, with pier-head lines established therein, the extension of East Waterway 400 feet in width, in which no pier-head lines were established, and a small part of Canal Waterway 300 feet in width. It also shows the outer and inner harbor lines on Elliott Bay adjoining the outlet of the waterway. Plaintiff's "Exhibit No. 3" also shows the location of both the East and West Waterways with respect to the adjoining tide lands and the pier-head lines therein.

In 1914, by joint action and consent of the War Department, the Port of Seattle, and abutting property owners, the pier-head lines in East Waterway were changed or drawn back to a distance of 125 feet from the shores, leaving a fairway of 750 feet in width, and a strip of water area of 125 feet in width on each side, between the new pier-head lines and the shore.

1. Appellant first contends that this pier-head line was not established by the Harbor Line Commission, but was sketched into the plat by the Board of Appraisers; that it was unauthorized by law,

and was not the state's act. (Brief, pp. 56-64.) This position is, in our opinion, foreclosed by the pleadings, and is not well founded in fact.

The bill of complaint (paragraph IV) specifically alleges "that the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore line of the premises herein described a pier-head line." This allegation is admitted in paragraph II of the answer of respondent Railroad Company. The fact of the establishment of this pier-head line by the state being thus admitted in the pleadings, no evidence was introduced during the trial of the case to prove the fact. No suggestion was ever made at any time during the progress of the case that the pier-head line was not established by the state until the question was raised by appellant's brief in this court. The existence of the pier-head line is recognized by the appellant in the permit granted by it to defendant Duthie & Company, made Exhibit "B" to its complaint. On page 62, Vol. I, Transcript of Record, is also found Resolution No. 142 adopted by the appellant on the 10th day of September, 1913, in which the pier-head lines are referred to as indicated on the official map of the harbor of Seattle in East Waterway.

In the opinion of the trial judge in the court below this finding was made:

> "In 1894 and 1895 the State Board of Land Commissioners pursuant to law (Laws 1889, 90 and 93) adopted and filed a plat of the state-owned tide lands creating the East and West Waterways, and establishing a pier-head line 250 feet from the bulkhead line, and approved contracts for the excavation of said waterways and filling in of the state-owned tide lands in the vicinity thereof."

In the abstract of the testimony of witness Blackwell, Vol. I of Transcript, p. 42, he states:

> "Plaintiff's Exhibit No. 1 shows a pier-head line in the East Waterway 250 feet from the bulkhead or property line. There is among the original records in the local United States War Office, Engineers' Department, a similar plat showing the same lines and the East Waterway laid out in the same manner with pier-head line 250 feet from the property line, and having upon it an endorsement that the pier-head line was approved by the War Department November 17, 1894, and a later endorsement that on June 18, 1914, the pier-head line was drawn in to 125 feet instead of 250 feet as formerly approved."

As stated above, the establishment of a pier-head line by the state having been admitted in the pleadings, no testimony was introduced on the trial to establish that fact. The case was tried by the court below on the basis of the fact as admitted in the pleadings, and we respectfully urge that the appel-

lant cannot at this stage of the proceedings question the existence of the pier-head line as a feature or part of the waterway as established by the authority of the state.

In this connection, appellant, on page 59 of its brief, makes the following statement:

> "We do not believe, notwithstanding the allegations of the answer, that counsel for respondent will contend that the plat of East Waterway filed by the Harbor Line Commissioners, and who alone were authorized to plat waterways (though they have no power to fix pier-head lines or do anything having to do with operations of a waterway when so platted) contains any pier-head line. It does not, in fact, though as a copy of that plat is not in the evidence this court cannot pass upon the fact."

We do contend that the pier-head lines shown on East Waterway were established by the Harbor Line Commission. We think, in view of the above statement of appellant, we are warranted in quoting from the brief filed on behalf of appellant on the trial of this case in the court below. After citing the constitutional and statutory enactments bearing on the subject, the brief contains this statement:

> "In the years 1894 and 1895, the following things were done under and by virtue of the various acts stated: First, the establishment by the State Board of Land Commissioners acting as a Harbor Line Commission of the East and

> West Waterways extending across state-owned tide lands; the establishment of a pier-head line 250 feet from the bulkhead line; this made the waterway area 250 feet wide on each side of the waterway. Second, the adoption and approval of the pier-head line laid down by the Board of State Land Commissioners by the Secretary of War. Third, the adoption and filing of a plat of the state-owned tide lands in Seattle. Fourth, the making of two contracts between the State of Washington and Eugene Semple for the excavation of the East and West Waterways and the filling in of the state-owned tide lands in the vicinity thereof."

The Legislature of 1893 (Session Laws 1893, p. 386) created a "Board of State Land Commissioners" and conferred upon the Board the powers of the Harbor Line Commissioners. This explains the statement of appellant's counsel in the court below that the pier-head lines were established by the State Board of Land Commissioners. It should be stated, however, in justice to the present counsel for appellant, that this action was brought and tried in the court below by other counsel representing the appellant. In the petition for rehearing filed in the court below by the present counsel, however, no suggestion was made questioning the validity of the establishment of the pier-head lines. The position of counsel with respect to the pier-head lines was stated in the petition for rehearing as follows:

> "*Effect of Pier Head Line on the Plat.* Counsel for defendant claims that the establishment of a pier-head line showed wharves to that line were contemplated, and claims that it must have been contemplated that the owner of the lands abutting upon the water would have the right to wharf out. Not so. The pier-head line emphasized the fact that the lot lines do not carry to the navigable line of the water, but that a strip of tide land intervened between the lots bought by the defendant and the navigable part of the waterway. The Sturtevant case made the right of wharf out absolutely dependent upon ownership to the line of navigability."

It will be observed that counsel admitted that the pier-head lines were legally established, and contended that the legal effect was to exclude the areas between the pier-head lines and the shores from the waterway—such areas remaining simply "tide lands;" the argument based thereon being to the effect that respondent's lots did not abut upon the waterway at all. This contention was in direct conflict with the decision in *State v. Sup. Ct.*, 91 Wash. 454, that the entire area between the boundaries of these waterways was held by the state in trust for public use. Consequently appellant's counsel again changed their position to the contention that no pier-head lines had been legally established.

The suggestion made by counsel in their present brief that the pier-head lines were sketched in the

plat by the Board of Appraisers is purely gratuitous. There is nothing in the record suggesting such an origin of the pier-head lines. The sole duty of the Board of Appraisers was to plat and appraise the tide lands and show their relation to the waterfront and the waterways. The statute required the Harbor Line Commission to establish and lay out both the harbor areas and the waterways; and it is manifest that both statutes contemplated that the plats filed by both the Harbor Line Commission (or its successor, the Board of State Land Commissioners) and the Board of Appraisers in the state and county offices, should be complete, in that they should show both the tide lands as surveyed, and the waterways as surveyed, and their relation to each other.

Counsel suggest, rather than argue, that the Commission charged with the duty to establish and lay out the waterways, had no authority to establish pier-head lines therein. As stated before, we do not think this question is open in the present case because the establishment of the pier-head lines by the state is admitted in the pleadings; but if it was an open question under the pleadings, we think the record shows that the establishment of these lines was authorized by the state, although the evidence

relating to it is merely incidental. The Waterway Act did not define either the length or width of these waterways, except the requirement that they should be not less than 50 nor more than 1,000 feet wide, and should commence at the outer or deep water end in not less than 20 feet of water at low tide. The Act devolved upon the Commissioners the duty of *establishing* these ways. They were intended as aids to commerce and navigation, and it was the duty of the Commissioners in establishing them to so locate them and give them such incidents as would carry out the object of the Legislature in providing for their establishment. The East Waterway proper was laid out 1,000 feet in width and was intended as a terminal or basin—a place where vessels would load and discharge cargo. Wharves and piers were necessary to the full utilization of the waterway for the purposes intended. It was not practicable nor contemplated that vessels should lie alongside the bulkhead or shore line for the purpose of loading or discharging. The excavation of the waterway under the Act approved March 9, 1893, was made with a slope from the shore or bulkhead line out to the pier-head line 125 feet from shore. As stated by defendant Blackwell (Transcript of Record, page 47), the depth of the excavation at the pier-head line was 26 feet and

it sloped gradually to the shore line, and "shallows up there so that at the shore line it would be bare at times of extreme low tide. There would be no water there. It is not in a practical way navigable." Wharves or piers were a necessity to any practical use of the waterway for the purposes contemplated in its establishment.

The plat of the waterway as established by the Commission, and with the pier-head line distinctly shown thereon, was filed in the state, county and city offices, as required by the statute, and became a part of the public records. The adjoining tide lands owned by the state were also platted, and this plat, which also showed pier-head lines in the waterway, was filed in the proper state and city offices. Thereafter, the state authorized the sale and sold the adjoining tide lands by reference to this plat. The pier-head lines as shown on the waterway plat were approved and adopted by the War Department as the line beyond which obstructions to navigation would not be permitted. Thus the official record of both the state and the United States showed the pier-head lines as a part of the established waterway.

The Act of the Legislature of 1913, under which appellant is claiming the right to control the use

of this waterway area between the shore and pier-head line, recognized the pier-head lines as an established fact and feature of the waterway. Extensive improvements extending out to and beyond the pier-head lines as at present located were made by owners of abutting lots long before the Act of 1913 was passed, without challenge by the state prior to the passage of that Act, so far as shown by the record. (Tr. of R. pp. 46, 47.)

We think that these outstanding facts show that the Harbor Line Commisisoners were authorized to establish these waterways, with pier-head lines separating the wharfage area from the fairway, as a part of the established waterway; and that the state, not only by the acts of its officers, but by its legislation, has recognized these pier-head lines as a feature or part of the waterway; and has sold the abutting lots by description based upon these official plats showing the pier-head lines as a part thereof. The plats, showing the pier-head lines, having been made by state officers, and filed as required by the state law, acquiesced in by the state for years, and the lots sold according to these plats and the money received and kept by the state, it and its grantees are now estopped to say that the pier-head lines shown on the plat were not established by authority of the state.

Lindsey v. Hawes, 2 Black (U. S.) 554.
Bigelow on Estoppel, 341.

2. Respondent Railroad Company acquired title to the lots abutting upon this waterway under mesne conveyances from the state. This title originated under a decree of the Superior Court of the State of Washington for King County, dated January 23, 1899, awarding the preference right of purchase under the then existing state laws to Kinnear and others. Under the state statutes (Session Laws, 1889-90, pp. 431, 435), the owner of uplands was given by the state a preference right to purchase from the state the tide lands in front of his uplands. Under the decree in the cause above mentioned, awarding this preference right to Kinnear and others, contracts were made by them with the state pursuant to the statute for the purchase of these tide lands. These contracts were complied with and the lots conveyed by the state in 1904, and through mesne conveyances acquired by respondent Railway Company in 1910 for a total purchase price of $288,060.00. The deraignment of respondent's title is shown in Volume 1, Transcript of Record, pages 58 to 61. The deeds from the state, under which respondent deraigns title, designated the property as "tide

lands of the first class," and described it by lots and blocks, "as shown on the official map of Seattle Tide Lands, filed with the Board of State Land Commissioners, at Olympia, Washington, March 15, 1895." (Record, p. 58).

The map referred to is "Exhibit 1" in this case. This map, which shows the lots as fronting on the Waterway, and also shows the Pier-Head lines as established in the Waterway, is made a part of the state's deed by this reference. Whether the right of access to the navigable waters in the Waterway passed to the purchaser of these abutting lots is, of course, a question of the proper construction of the state's grants.

It is the contention of respondent that the purchase of these lots abutting upon this artificial waterway from the state gave to the purchaser the right of access to the navigable waters of the waterway and the right to make access convenient for navigation and commerce by appropriate facilities, such as wharves, docks and piers. The appellant, on the other hand, contends that the abutting owners acquired no such right of access, and that the state retained the right to, and by the Act of 1913, did, carve out a strip of water area extending from the shore of the waterway to the pier-head

line, which had the effect of cutting off access to the waterway from the abutting property; and it further claims that it has derived from the state the right to lease or use this area for purposes of revenue, and to prevent the abutting property owners from using it for purposes of access, except under lease from the appellant. This presents a question of construction of the state's grant, and is to be decided by the local law.

The Supreme Court of Washington has held that the lands included within the boundaries of the waterways created pursuant to the Act of 1890, were thereby withdrawn from the general mass of public lands held by the state as proprietor or owner and dedicated to a public use.

> "The lands within their boundaries thus become segregated from the general mass of the state's lands which it holds in its proprietary capacity, and become vested in that special class which it holds for the public use."
>
> *State v. Sup. Ct.*, 91 Wash., 454, 459.

The decree in the case at bar followed this decision and held that the port had no proprietary right or ownership of the area within the boundaries of the waterway.

The same Legislature that created the waterways authorized the extension of streets over these

tide lands; and the court, in the case last cited, held that the lands embraced within the boundaries of the waterways were thereafter held by the state in the same capacity it held the lands within the borders of the streets—that is, not in a proprietary capacity, but as property dedicated to a public use.

There is nothing in the character of the state's ownership of the bed of the waterway which negatives a right of access by the abutting property-owner, and such right of access is strictly analogous to the property-owner's right of access to the streets adjoining his property.

We do not question the doctrine laid down by the Supreme Court of Washington in the case of *Eisenbach v. Hatfield*, 2 Wash. 236, and the numerous other later decisions following that case. It is undoubtedly the established doctrine in this state that the owner of upland as such has no right of access across intervening state owned tide or shore lands to the navigable waters in front thereof, unless he acquires such right by grant from the state. The source of title to uplands is the United States. By Section 1, Article XVII of the State Constitution, the state asserted its ownership to the beds and shores of navigable waters of the state, including the tide and shore lands up

to the line of ordinary high tide in tidal water and to the line of ordinary high water in navigable rivers and lakes. This declaration of state ownership of tide and submerged lands is merely declaratory of the law as recognized by the decisions of this court in the absence of such state declaration, and declared the state policy to extend the state's right of control and regulation of the shores at tidal waters to the shores and beds of navigable lakes and rivers.

Hardin v. Jordan, 140 U. S. 381, 382.
Shively v. Bowlby, 152 U. S. 1.

Prior to the admission of the state into the union, the title to these submerged lands was held by the United States in trust for the future state. The unsold uplands were held by the United States as owner. Upon the admission of the state into the union the title to these tide and submerged lands passed automatically to the state. The point decided by the *Eisenbach* and subsequent cases is that a person acquiring title from or through the United States to uplands, did not acquire title to or any right in the submerged lands owned by the state in front of the uplands, and that riparian rights over the state's submerged lands did not attach to or pass as an appurtenance to uplands derived

by contract or mesne conveyances from the United States. What rights the state would permit such upland owners to acquire over the state's submerged lands and the conditions that would be attached thereto were entirely questions for the state. Neither the *Eisenbach* case nor any other Washington case cited by counsel for appellant holds that a state grant of shore or tide lands does not carry the littoral or riparian right of access to navigable waters fronting thereon. What they hold is that under the Constitution and laws of this state the conveyance of the uplands, title to which is deraigned from the United States, does not pass riparian rights over tide and shore and other submerged lands owned by the state. The property owned by the respondent Railroad Company in this case was not upland, but was tide land formerly owned by the state and by it conveyed by mesne conveyances to respondent. The doctrine of the *Eisenbach* case and other state cases dealing with the right of the upland owner to access to the navigable waters in front thereof over state owned tide and shore lands, has no bearing upon the question of the right of the purchaser of tide lands from the state to access to the navigable waters of an artificial waterway created by the state through and over its own tide lands.

The title of the respondent Railroad Company in this case is similar to the title of Bowlby in the case of *Shively v. Bowlby*, 152 U. S. 1. There Shively claimed littoral rights as the owner of the uplands; Bowlby claimed littoral rights by virtue of his purchase of the tide lands from the state. Both the state court and this court treated littoral rights—including the right of access to the navigable water and the wharfage right—as belonging to the owner of the tide lands. The only distinction between the Bowlby rights in that case and those of respondent lies in the fact that Bowlby's tide lands fronted natural tide-water, while respondent's tide lands front on an artificial waterway created by the state.

The state was the sole owner of this body of tide lands lying south of Elliott Bay. As such owner it created this waterway running through its own lands, and it had a right to and did impress upon the waterway such incidents and characteristics and attached such rights in the waterway to its subsequent grants of abutting lots as it saw fit. It undoubtedly could have provided for a water area within the limits of the waterway similar to the harbor area created by the Constitution in the bays and inlets of the sea. On the other hand, we as-

sume it will not be denied that the state, being such absolute owner of the land, had the right to create the waterway over its own land without creating any harbor area within its limits. Article XV of the Constitution has no application to such a situation. It applied to the natural waters of the state existing at the time the Consitution was adopted. This artificial waterway is wholly a statutory creation. If the statute creating the waterway had specifically provided that subsequent purchasers from the state of adjoining lots should have rights of access to the waterway, it could not reasonably be contended that such rights would not have attached to such grants.

Even if it should be held that Article XV of the State Constitution requires the establishment of harbor areas in artificial waterways created by the state, it has never done so with respect to this waterway. The court below expressly held that no harbor lines or harbor area had been established in this waterway, and appellant states in its brief that it does not controvert that finding on this appeal. The Constitution required the establishment of the harbor lines by a commission appointed by the legislature. The mode of exercising the power, as prescribed in the Constitution, is a limi-

tation upon the power of the legislature. Constitutional harbor lines cannot be established in navigable waters in any manner except by the mode prescribed in the Constitution itself. This principle is recognized by the Supreme Court in

Puget Mill Company v. State, 93 *Wash.* 128-137.

Harbor lines cannot be established by legislative fiat. The Harbor Line Commission in establishing the pier-head lines in this waterway, evidently did not intend that the pier-head line should be in legal effect a harbor line. The same commission established the harbor lines along the shore of Elliott Bay in obedience to the constitutional mandate, and designated them respectively "outer harbor lines" and "inner harbor lines." At the same time—and as shown on the same map—they established this waterway and established the line therein called "pier-head line." The term "harbor lines" is used in both the Constitution and statutes of the state and has a well understood meaning. The term "pier-head line" is not used in either the Constitution or statutes of the state. Its meaning, therefore, must be determined by other considerations.

In the case of *Puget Sound Mill Company v. State*,

supra, the commission had established a pier-head line in their plats of Lake Washington. Referring to the significance to be attached thereto, the Supreme Court in the Puget Mill case, *supra*, used the following language:

> "The designation of a pier-head line alone upon the state's plats, is not, as we view the law, the establishing of harbor lines or harbor areas. These words may suggest the outer limits of the piers, but we think they should, in no event, be construed as fixing the inner harbor line, which, when established, becomes the outer shore line boundary."

It is our view that the state, after the sale of these abutting lands, had no power to establish a harbor area within the limits of this waterway with the effect of destroying the right of access to the navigable waters of the abutting lot owners; but that question is not involved in this case. No harbor area has ever been established in this waterway, and, therefore, the appellant was not entitled to a decree in its favor based upon the assumption that the state may, at some future time, establish a harbor area. In the Puget Mill Company case, the court held that even where the state had the right to establish a harbor area, but had not done so, the purchase of the shore lands from the state, gave the purchaser the right of access to the navi-

gable waters in front thereof, and that the state could not interfere therewith except by lawfully establishing a harbor area in the method prescribed by the State Constitution. If such right exists as against respondent, it is preserved to appellant by the decree of the court below.

A similar ruling was made in

State v. Sturtevant, 76 Wash. 158-166.

It follows that Article XV of the Constitution withdrawing harbor areas from private use except under lease from the state, and the state decisions, such as the *Eisenbach* case, denying riparian rights to upland owners in these harbor areas established in tide, shore and submerged lands owned by the state, may be disregarded as inapplicable in this case, first, because the constitutional provision does not apply to an artificial canal created by the state across state-owned tide lands; and, second, because no harbor lines or harbor areas have been established in this waterway. If the state should ever establish a harbor area within this waterway, its legal effect as against abutting lot owners can be determined when the case arises. That question is not involved and was not decided in this case.

The right of the respondent to access to the navigable waters and to "wharf-out" to the pier-head

line, depends in the last analysis upon a proper construction of the grant by the state of the abutting lots, and a consideration of the legislative act creating the waterway, the acts of the state through its officers in establishing and marking the pierhead lines thereon, and the relation of the abutting land to the waterway; and from these circumstances the intention and purpose of the state in its grant of the adjoining lots must be ascertained.

(a) We recognize the rule that grants by the state are to be strictly construed in favor of the state; but these grants, like all others, must be construed in such a way as to give effect to the intent of the parties, so far as the language will permit.

In *State v. Sturtevant*, 76 Wash. 158-166, the court, in recognizing the rule that "a grant by a sovereign state is to be construed most strongly against the grantee," states that "it is also a rule as well, if not better, established, that a grant from a sovereign when made either with or without consideration, is to be so construed as to effectuate the legislative intent, and avoid, if possible, unjust and absurd consequences," citing *U. S. v. O. & C. R. Co.*, 146 U. S. 526, and *Miller v. Mendenhall*, 43 Minn. 95.

(b) We have heretofore pointed out that the defendant's predecessors in title were the owners of the upland abutting upon these tide lands. By the assertion of title on behalf of the state, in Article XVII of the State Constitution, to the tide and shore lands, these owners were shut off from navigable waters by the interposition of the tide land area owned by the state.

The first legislature of the state passed an act—Session Laws, 1889-90, pp. 431-7—Section 11 of which provided that the owner of abutting uplands should have the preference right to purchase from the state the whole or any part of the tide lands in front of his lands, at the appraised value. Section 12 of the same act provides:

> "When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser any portion of the tide lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed."

This is a clear legislative recognition that a purchaser of tide lands from the state would thereby acquire the littoral rights as a part of or an appurtenance to the land purchased.

As pointed out by the Supreme Court in *State v. Sturtevent*, 76 Wash. 158, the legislature, apparently recognizing that these upland owners had been dealt with somewhat harshly, passed this act giving the upland owners the preference right of purchase of the intervening tide lands, for the purpose of enabling such upland owners to acquire the riparian rights in the navigable waters by such purchase. The court said:

> "In other words, the upland owner was given the first right to purchase the right of access to deep water which the state had previously cut off, that is, the riparian right in the shore."

And again:

> "That littoral and riparian rights attach to shore lands, is recognized in *Bilger v. State* where, after holding that the purchaser of shore lands took title free from any claim of the upland owner as to riparian and littoral rights, the court said: 'It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington, were acquired by them in virtue of the purchase of the shore lands made by them from the State of Washington.'"

That the purchaser of either tide or shore lands acquires the riparian rights is also recognized in *Van Siclen v. Muir*, 46 Wash., 38, and *Muir v. Johnson*, 49 Wash., 66.

In all of these cases the court not only held that littoral or riparian rights pass from the state to the purchaser of the adjoining tide or shore lands, but that such rights include the right of access to the navigable waters in front thereof and the wharfage right.

Appellant contends that these cases were dealing with rights acquired by a purchaser of shore lands and are not applicable to the purchaser of tide lands. The cases cited involved the rights of the shore land owners on Lake Washington. The statutes of the state define tide lands as extending to the harbor line, when established, while the outer boundary of shore lands is not stated. That distinction, however, in the description of the area, does not qualify the broad doctrine laid down in these cases with respect to the littoral and riparian rights acquired by the purchaser of either tide or shore lands. The constitutional reservation of title extends alike to both, and, as pointed out by the Supreme Court in the Sturtevant case, the effect of this constitutional provision was to interpose between the upland owner and the navigable waters, a strip reserved by the state called "tide land," where there is an ebb and flow of tide, and "shore land" in the lakes and navigable rivers. The pref-

erence right to purchase referred to by the court in that case extended to both tide and shore lands, and was passed in order to give the purchasers of either tide or shore lands the right to reach navigable waters in front of the land so purchased by them, and this right is recognized in all of these cases. Littoral rights were also recognized by the statute above quoted as attaching to the tide lands.

While the cases cited involved riparian rights in Lake Washington, the principle announced is applicable to any navigable waters.

In the *Van Siclen case, supra*, the court says:

> "As an upland owner merely he has no riparian or littoral rights in the navigable waters of the lake. These belong to the owner of the shore lands, which at the present time is the state, and it, and it only, can claim that an obstruction placed in such navigable waters is an interference with the riparian and littoral rights following the ownership of the shore lands," citing the *Eisenbach* case.

Again, in *State v. Sturtevant*, 76 Wash. 158, 165, the court, referring to *State ex rel. v. Forrest*, 11 Wash., 227, stated that that case "proceeded upon the theory that the Constitution and then existing statutes made it plain that it was the policy of the state to dispose of its tide and shore lands of the first class up to the line of navigability or

up to the inner harbor line." It will be noted that no distinction is intimated between the state's policy, as fixed by its Constitution, with respect to riparian and littoral rights; they belong to the owner of the tide land or the shore land, and extend, where harbor areas have been established, to the harbor line, and where harbor lines have not been established, to the line of navigability.

> "The only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation. * * * The area lying between high water and the line of navigability, as fixed or to be fixed by the inner harbor line, being, whether submerged or not, theoretically non-navigable, is treated as land and not water, and is wholly within the keeping of the state. The value of shore lands in most instances lies in the fact that ownership gives access to deep or navigable water. The state has sold, and the purchaser has bought, believing this to be true. The right of a riparian proprietor or a shoreowner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled."
>
> *Sturtevant case, supra.*

We think these cases clearly settle the local law to the effect that riparian and littoral rights belong to the owner of the abutting tide or shore land, whether such owner be the state or its grantee; and, as to natural—as distinguished from arti-

ficial—navigable waters, these rights include the right of access and the "wharfing-out" right. The use of the word "littoral" by both the legislature and the court, indicates that both had in mind the rights of shore owners on arms of the sea.

In the present case the state had given the upland owner the preference right to purchase the intervening land between his upland and the navigable waters, and thereby acquire right of access to such waters; but before conveying the tide land to such purchaser, the state created an artificial waterway across the tide lands and platted the tide lands so as to abut upon this artificial waterway, instead of upon the shore of the sea. Under these circumstances—having in view the policy of the state in granting this preference right to purchase, as explainted by the Supreme Court in the *Sturtevant* case, and the general rule that the right of access is appurtenant to tide lands,—it would seem reasonable to expect the state to grant to the purchaser of these tide lands the right of access to the navigable waters of such artificial canal upon which the land so abuts; or, if the state intended to withhold from the purchaser such right of access, that it would signify this intention in some way, either in the legislation creating the waterway, or

by some significant designation or marking on the plats of the waterway, or in its grants. It being the established doctrine of the state that riparian rights upon abutting navigable waters attach and become appurtenant to tide and shore lands when sold by the state, a contrary intention in the present instance should be clearly and plainly shown by some legislation or act of the state. An intention to separate the water right of access and wharfage from the abutting property will not be inferred from the mere platting of the ground with a line running along the shore.

Watson v. Peters, 26 Mich., 508.
Bailey v. Burgess, 11 R. I., 330.

To now attribute to the state an intent to sever the water right from the abutting property, when the state did not clearly manifest such intention at the time it disposed of the abutting property, is an imputation upon the state's good faith. It is also pertinent to observe in this connection that the waterway was practically useless without wharves; that, if it was not intended that the abutting owner should construct such wharves, they could not be constructed by anyone, as there was no law (prior to this act of 1913) that authorized the leasing of the wharfage privilege or the construction of

wharves within the waterway area by any other person or municipality. By the terms of the Act of 1889, under which these waterways were created and dedicated to public use, none of the area therein could be leased by the state; and consequently no wharves could be constructed therein, unless it was intended that the abutting owner should have that right. The necessity for wharves, and the failure to make provision for their construction otherwise, certainly suggested, at least, that it was intended that the wharves would be constructed from time to time as needed, by the person most interested, the adjoining owner.

(c) The harbor areas created under Article XV of the Constitution, are clearly defined upon the state plats, and the respective rights of the state and of abutting owners therein were clearly defined in the Constitution and the statutes carrying this provision of the Constitution into effect. It was the policy of the state with respect to these areas, as expressed in the Constitution, to reserve them forever from sale and provide general laws for leasing them for use in connection with commerce and navigation. If the state had intended to reserve a similar area within the limits of these artificial waterways, it would unquestionably have

followed the same general scheme of management, that is, the legislation creating the waterway would have provided for reserving the area from sale, and the state officials would have been authorized by the act to lease these areas in the same manner as harbor areas were authorized to be leased. In the act creating the artificial waterways, however, no such plan is outlined. On the contrary, the act specifically provides that these waterways (which include the entire area therein) shall never be *leased* by the state.

Undoubtedly, it was contemplated that wharves would be constructed within the limits of the East Waterway, where it had a width of one thousand feet. The waterway would be practically worthless without wharves. The commissioners in establishing the waterway, designated a pier-head line thereon, and this line must imply that wharves or piers may be constructed from the shores out to that line. That is the significance attached to a pier-head line by the State Supreme Court in its decision in the *Puget Mill Company's* case, *supra.*

These wharves could be constructed and operated in either of three ways:

(1) By the state.

(2) By a lessee of the state.

(3) By the owner of the abutting property.

(1) It cannot reasonably be assumed to have been intended by the legislature that the state itself would construct and operate these wharves, because it was not at that time either the policy or practice of the state to engage in the wharfage business or to construct and own wharves. Its declared policy with respect to harbor areas, as shown by the Constitution and statutes at that time, was to lease this area for wharfage purposes, retaining only the general power of regulation of rates.

(2) It was not the intention of the state to lease the area in the artificial waterways for wharfage purposes, because the act creating the waterways specifically provided that the area should be forever reserved from lease as well as from sale.

(3) It must, therefore, have been the intent of the legislature when this legislation was passed creating waterways, that the owners of the adjoining or abutting lots should have the wharfage right.

Where the state has established a line marking the line of navigability, it is generally held by the courts that the establishment of such a line operates as an invitation and concession to the shore owner

to utilize the area between the shore and such line for access to the navigable waters, and that a grant by the state of the abutting lands carries with it this right of access and the right to wharf out to such established line, in the absence of any legislation by the state to the contrary.

In *Aborn v. Smith*, 12 R. I., 373, the court held that the establishment by the state of such a line—called in that state a "harbor line"—was a permission or authorization to the abutting owner to wharf out to such line. In this case the line was designated as a "harbor line," but there appears to have been no constitutional or statutory definition of such a line in Rhode Island, so that the legal effect was the same as the establishment in this state of a line called "pier-head line."

In *Miller v. Mendenhall*, 43 Minn., 95; 44 N. W. 1141, the state had also designated a line called a "harbor line" along navigable waters. With respect to this line the court said:

> "The action of the legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right. It settles the line of navigability above which the state will not interfere, and is an implied concession of the right to build, possess and occupy to the established line, which amounts practically to a qualified possessory right."

This Minnesota case is cited by the Supreme Court of Washington in *State v. Sturtevant*, 76 Wash., 158, with approval.

Appellant cites *Wilson v. O.-W. R. & N. Co.*, 71 Wash., 102, as holding that the establishment of a pier-head line beyond the harbor lines confers no rights upon the lessee of the harbor area. It does not so hold. In that case the state, pursuant to the Constitution, had established harbor lines in these waters, and had leased the harbor area. The War Department had established a line, which prescribed the limit of encroachment upon the navigable waters, this line being beyond the outer harbor line. Wilson was a lessee of the harbor area; the railroad company had by proper authority, constructed a bridge across the river, one of its piers being located between the outer harbor line of the state and the line of navigation established by the War Department. The court held that the lease of the harbor area by the state to Wilson did not give him any such interest in the bed of the river beyond the harbor area as entitled him to claim consequential damages for the construction of a bridge pier therein under state and United States authority. The case has no bearing whatever upon the significance to be given to a pier-head line established by the

state in a canal created by it upon its own lands, and the survey and sale by the state of the lands abutting thereon. The line of navigation established by the War Department merely signifies the consent of the government to the building of structures out to that line, but gives no title or right, as the state owns the bed of the stream; but when the state as well as the War Department establish this line of navigation, they both signify their consent that the owner of the riparian right of access may build out to that line.

That the right of access and to wharf out to navigable waters exists in this state, as an appurtenant to the abutting land—except as cut off by the Constitution and statutes of the state where harbor areas have been established—as has already been pointed out, is expressly decided by the court in the Sturtevant case. The court there says:

> "The right of a riparian proprietor or shore owner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled. 29 Cyc., 341; Farnham on Waters, Section 101; *Miller v. Mendenhall*, 44 N. W., 1141."

In that case the state had sold the shore lands on Lake Washington. Under the statute defining the shore lands, the outer or water boundary was not defined. After the state had sold these shore lands,

the state artifically lowered the waters of the lake, thus withdrawing the line of navigability further from the shore. The state contended that the grants from the state were present grants and conveyed the submerged lands only out to the line of navigability as it existed at the date of the deeds. The court held, however, that the state conveyed the riparian right of access to the navigable water, and that if it artifically changed the line of deep water, the shore land owner's riparian rights extended out to the new line of deep water. This case clearly recognizes the principle that right of access, including the "wharfing-out" right, attaches to and passes as an appurtenance of the abutting land, save only where the right is denied by the Constitution as to uplands.

The appellant contends that the cases cited by us on this point are inapplicable to the situation of the present case. The distinction which it claims is not made very clear in its brief. It is true that both the Minnesota and Rhode Island cases cited were controversies between private parties. The principle announced in these cases, however, is applicable to all grants, whether by individuals or the state, in the absence of any state legislation restricting the terms of the grant. As stated above,

the Supreme Court of Washington cited the Minnesota case and applied the principle to a state grant in the Sturtevant case.

It is also suggested that the principle is inapplicable because of the constitutional provision of this state with respect to harbor areas. As stated above, the rights of abutting owners in this artificial area are to be determined by the legislation creating it, and the acts of the state in marking, platting and selling the abutting land, and the principle settled by the State Supreme Court to the effect that rights of access attach as an appurtenance to grants of tide and shore lands abutting upon navigable waters, in the absence of any constitutional or statutory prohibition.

It seems to us evident that Article XV of the State Constitution providing for harbor areas, does not apply to this artificial waterway. It is well settled in this state that the state as absolute owner has the right to make any disposition of tide lands it sees fit; its power to dispose of them is unrestricted; it can sell them in their submerged condition, or it can—as it did in this instance—create an artificial waterway out of a part of the tide lands, and fill and make dry land of the balance and sell in that changed condition.

That the rights of the abutting land owners are to be determined by the terms of the legislation creating the artificial canal, and the state's acts thereunder, is, we think, well settled by the authorities.

In *Dana v. Commission*, 31 Cal., 118, the court was considering rights in an artificially created water front, and used this language:

> "We do not consider that the plaintiff is a riparian proprietor in the sense in which that term is used in the law of tidewaters. He is not an owner upon the 'shore,' but upon a 'water front' of statute creation. The water front established by the act of March 5, 1851, *is what that act had made it to be*, and the rights of the plaintiff as the owner of a beach and water lot abutting upon it, exist only in subordination to that act."

See also

Weber v. Harbor Commissioners, 18 Wall. 57.

These cases hold that when the waterfront is artificially created by the state, all subsequent purchasers from the state hold their property on such water front subject to the terms and with the incidents given by the act creating the water front.

The Act of the State of Washington of 1890, authorizing the creation of artificial waterways,

designates them as "public ways," and provides that they shall be forever reserved from sale or lease and for use only for water craft. They are analogous to streets and highways in so far as the rights of ingress and egress by the abutting owners are concerned.

3. If the right of access claimed by the respondent attached to the abutting property as an appurtenance at the time the state conveyed it, such rights became vested property interests, and the state could not by any action which it might take thereafter deprive the respondent of these property rights, except by condemnation and making due compensation.

In the *Sturtevant* case the court expressly held the right of access to the navigable waters which had attached to the grant by the state of the shore lands could not be taken from the purchaser by any subsequent act of the state—that the state could not, either by its own act or by granting the privilege to another, "destroy the substance of its deed."

In *Weems Steamboat Company v. People's Steamboat Company*, 214 U. S., 345, the rule is stated as follows:

> "The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right among others, to build private wharves out so as to reach the navigable waters of the stream * * * A private wharf on a navigable stream is thus held to be a property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use, due compensation must be made."

This doctrine was announced by this court as early as *Yates v. Milwaukee*, 10 Wall., 497, and has been reaffirmed in many other cases cited in the Weems case.

It does not in the least conflict with those cases in this court asserting the paramount right of the government to improve the waters for purposes of navigation, without liability to make compensation for any injury to private property rights in so doing. Riparian rights, or rights in the nature of riparian rights, in navigable waters over which the government has jurisdiction, may be injuriously affected, or possibly even destroyed, by the United

States, if such destruction is the result of governmental action in improving navigation of the waters. These property rights cannot, however, be destroyed or taken away by the state or its grantee, as is attempted to be done by the appellant in this case under the Act of 1913, not for the purpose of improving the navigation of the waters, but for the sole purpose of transferring the rights of access from the respondent to the appellant, as a source of revenue to the appellant.

Appellant has cited and quoted quite extensively from the case of *Newell v. Loeb*, 77 Wash., 182, in support of access which the state could not take from him. That case is bottomed upon the right to improve navigation by straightening the stream. The Waterway District was authorized by the state statutes to straighten and deepen the channel of Duwamish River, a navigable stream. The court stated that "the object of the improvement sought to be made by the commissioners is to straighten the channel of Duwamish River between the termini of the district." The scheme of improvement contemplated would divert the waters from a bend of the river in front of Loeb's property to a new and shorter channel; and Loeb claimed damages for loss of access to the stream. The court held that

these rights were subject to the paramount right of the state or of the United States to improve navigation. We may concede this doctrine in its broadest application. The appellant in the present case is not seeking to destroy the right of access as a result of any improvement of navigation, but to appropriate the right of access as a means and source of revenue to itself.

The decree of the court below does not in any way restrict either the United States or the state, or any grantee or agency of the state, in carrying on any plan for the improvement of the navigation of this waterway, nor from exercising proper police control and regulation of the use thereof, nor adjudicate upon the right of the state to establish harbor lines therein under Article XV of the Constitution. It adjudicates only that the port has no proprietary rights or interests in the waterway area, and is not entitled to lease the same for revenue; and that respondent Railroad Company, by virtue of the grants to it of the abutting lots by the state, is entitled to access to the navigable waters of the waterway, "subject to proper governmental supervision."

We think there is no error in this decree of which appellant can complain.

Respectfully submitted,

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